

RECEIVED
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
2007 MAR 16 AM 10:03
NORTHERN DISTRICT

2:06cv1129-MEF

UNITED STATES OF AMERICA
U.S. DISTRICT COURT
MIDDLE DISTRICT ALA.

v.

CASE NO.: 2:04CR-0025-F

AMY ANN PITTS,

Defendant

RESPONSE TO GOVERNMENT'S MOTION FOR LEAVE TO FILE
MOTION TO DISMISS DEFENDANT 'S 28 U.S.C. § 2255 MOTION

COMES NOW, Amy Ann Pitts, Pro Se, who respectfully move that this Court would move to deny the government's Motion to Dismiss my 28 U.S.C. § 2255 based on lack of merit. As I have stated in my previous paperwork, I do have grounds and will further re-iterate these as stated below:

I. WAIVER OF COLLATERAL ATTACK RIGHTS IN PLEA AGREEMENT:

In accordance with the letter dated October 3, 2005, from my former Attorney, Barry E. Teague, deceased, it was a notice to the fact that the government had breached the plea agreement.

It has been stated that the government is bound by any material promises it makes to a defendant as part of a plea agreement that induces the defendant to plead guilty. Santobello v. New York, 404 U.S. 257 (1971); United States v. Johnson, 132 F.3d 628 (11th Cir. 1998); United States v. Rewis, 969 F.2d 985 (11th Cir. 1992); United States v. Boatner, 966 F.2d 1575 (11th Cir. 1992). Whether the goernment violated the agreement is judged according to the defendant's reasonable understanding

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at the time he/she entered his/her plea. United States v. Taylor, 77 F. 3d 368 (11th Cir. 1966).

In United States v. Taylor, supra, the government agreed to recommend a sentence of ten years. The pre-sentence report, however, indicated that the relevant conduct would result in a sentence of approximately fifteen (15) years. The defendant challenged the applicability of the relevant conduct. The government responded that the evidence supported the pre-sentence report's conclusion and the government was prepared to prove that the relevant conduct occurred. Nevertheless, at sentencing, the government recommended a sentence of ten years. This amounted to a breach of the plea agreement. When the government's statements regarding the pre-sentence investigation are inconsistent with the plea agreement the government has breached that agreement.

In my case, as stated in the late Attorney Teague's letter, I entered into plea of guilty based on the agreement contained in the "proffer" letter in which the government recommended a 36 month prison sentence. The agreements contained in the "proffer" letter are separate, additional and distinct from those contained in the "plea agreement" between the government and the defendant dated April 11, 2005.

Based on the "proffer" agreement, I clearly understood what I was agreeing to based on the recommendation for a 36 month sentence and I fulfilled all my agreed upon issues in the agreement. I cooperated with the government and provided information that put my life in jeopardy in order to fulfill my agreement with the government.

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In accordance with the Change of Plea hearing that I attended on April 11, 2005, Government Exhibit B, page 2:21-25 and page 3:1-5, I pled guilty to count one of the indictment which is possession with intent to distribute narcotics. In return for my cooperation in this case, the United States agreed that I would receive a 36 month term of imprisonment and that they would not use any prior information that I had stated against me at sentencing, but of course they did.

When the government breaches a plea agreement regarding a sentencing recommendation, there are two available remedies: either allow the defendant to re-plead, or remand the case to a different judge for re-sentencing. Of this was not done either. According to the transcript, the judge question whether there was an agreement, but stated that since the government stated that I had violated the terms of the agreement, they would be released from their obligations and/or promises, but that I would be bound by my obligation as it relates to the agreement.

During the January 31, 2006, Sentencing Hearing, according to the court on page 4:13, it states that I violated Section (4)(j) of the agreement, which dealt strictly with me committing any new state or federal criminal offense while awaiting sentencing. I did commit a state or federal offense at the time of sentencing, but was not charged. I did not violate the terms of the agreement. As my attorney explained the agreement to me, I would have to receive another offense in order to violate the agreement, I did not violate the agreement in accordance with my understanding of the terms of the agreement. I did admit to

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the failure of the drug test, but I did not receive another charge for this failing of the urine test. Therefore, it is my understanding that the government would have to give me another charge in order for me to violate the terms of the agreement.

Therefore, I feel that the government violate the agreement and the matter was not properly handled by the court. I was never given the opportunity to re-plead or the case was never remanded to another judge for sentencing.

II. VIOLATION OF MY SIXTH AMENDMENT RIGHTS - PRESENTENCE INVESTIGATION REPORT (PSI)

According to my attorney, (now deceased), it was explained to me that my plea was 11(c)(1)(C) - which is a judicial participation, which means that attorneys for the government and the defendant may engage in plea discussions with a view toward reaching an agreement, but the rule concludes with a strict admonition that the court shall not participate in any such discussions. *United States v. Casallas*, 59 F.3d 1173 (11th Cir. 1995). The primary concern of those who would dissociate the judge from the plea bargaining process has been that judicial intervention may coerce the defendant into an involuntary plea that he would not otherwise enter. *United States v. Corbitt*, 996 F.2d 1132 (11th Cir. 1993). Three rationales have been advanced for the strict prohibition on judicial participation: (1) judicial involvement in plea negotiations inevitably carries with it the high and unacceptable risk of coercing a defendant to accept the proposed agreement and plead guilty; (2) to protect the integrity of the

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judicial process; (3) to preserve the judge's impartiality after the the negotiations are completed. *United States v. Casallas*, supra. This makes me wonder, if the sentencing judge had the right to proceed with the sentencing without letting me re-plead or remand it back to another judge for sentencing.

However, according to page 5:20-25 and Page 6:1-3, my attorney at the time had objections to the PSI report, on page 9:16-25 and 10: 9-25, he was conversing with the court as to the objections that he and I had discussed prior to the sentencing hearing, but during the sentencing, when he was asked to present the objections along with his evidence to negate the objections, he withdrew all objections without informing me as to what was happening nor did he discuss this decision with me. Therefore, I feel my attorney did not act in good faith as it relates to presenting my objections and trying to resolve the issues with the Court.

In Section §6A1.3 - Resolution of Disputed Factors, in subsection (a), it states, "when any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the court regarding the factors.

Subsection (b) the court shall resolve disputed sentencing factors at a sentencing hearing in accordance with Rule 32(c)(1), Fed. R. Crim. P. Rule 32 requires that the Court make specific factual findings of contested matters to the presentence report. *United States*

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v. Pofhal, 990 F.2d 1456 (5th Cir. 1993).

The Tenth Circuit held that the trial court's failure to make factual findings to specific challenged information in the Presentence Investigation Report is reversible error. *United States v. Alvarado*, 909 F.2d 1443 (10th Cir. 1990) and *United States v. Leroy*, 944 F.2d 787 (10th Cir. 1991).

It is my understanding that when a defendant challenges the factual accuracy of a presentence report, strict compliance with Rule 32 is required. *United States v. Jones* 907 F.2d 929, 931 (9th Cir. 1990). Failure of my attorney to pursue the objections definitely is in violation of my Sixth Amendment Rights and the court did not take any additional steps to make sure all the factual objections raised were addressed, even though he withdrew without my stating that I did not want to pursue the objections. Therefore, my attorney, as well as, the court did not follow through in accordance with Rule 32 and I would have indicated that I wanted to resolve the issues that were presented to the court.

There violates on the part of the government, as well as, I did commit another offense, but I was never charged with the offense, therefore, I did not violate the agreement,

In order for the court to review this matter with a clear understanding of my objections, the court would have to Order the government to reply to my grounds stated in the § 2255 and not dismiss it based on the facts stated in the government's response.

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III. CONCLUSION

Due to the circumstances surrounding this case, I feel that my § 2255, should not be dismissed because the government feels that I violated the agreement. All the information and case law presented in my § 2255 and Memorandum of Law clearly states my concerns very clearly. I stated facts based on case law and procedures. Therefore, it is my desire that this Honorable court will review the facts of this case and Order the government to respond to the grounds of my § 2255 and also make a determination as to whether the government violated the plea agreement in the manner in which they handled the plea.

My final argument in this matter is the fact that I followed the terms of the agreement as it was explained to me by my deceased attorney. The government, however, made changes to the presentence report and I was never informed of the changes and had no idea of the changes and what it meant to me taking a plea. There were violations on the plea and I would like to request this Honorable court to proceed with my § 2255.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Amy Ann Pitts".

Amy Ann Pitts, Pro Se
REG #11373-002
FPC - Marianna
Seminole A
P. O. Box 7006
Marianna, FL 32446-7006

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff

v.

AMY ANN PITTS
Defendant

CASE NO.: 2:04CR-0025-F

CERTIFICATE OF SERVICE

COMES NOW, AMY ANN PITTS, Pro Se, I certify that I have enclosed my Response to the Government's Motion to Dismiss my § 2255. The documents were placed in the mail receptacle located at the FPC - Marianna Camp and the envelopes where stamped by R&D. The proper postage was affixed to the envelopes.

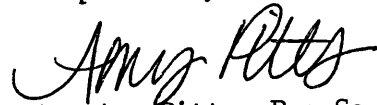
The documents was sent to the following individuals:

Mr. Todd Brown
Assistant United States Attorney
P. O. Box 197
Montgomery, AL 36101-0197

CLERK OF COURT
United States District Court
P. O. Box 711
Montgomery, AL 36101-0711

This document was taken to R&D and placed in the mail on 13th
March, 2007.

Respectfully submitted,



Amy Ann Pitts, Pro Se
REG #11373-002
FPC - Marianna
Seminole A
P. O. Box 7006
Marianna, FL 32446-7006

AMY ANN PITTS
REG #11373-002
FPC - Marianna
Seminole A
P. O. Box 7006
Marianna, FL 32446-7006

CLERK OF COURT
UNITED STATES DISTRICT COURT
P. O. BOX 711
MONTGOMERY, AL 36101-0711

